

'Tell Us About Your Crypto Impact' - SEC Posts Sample Comment Letter

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PRACTICES Litigation, Capital Markets and Securities

In the wake of increasing financial distress and high-profile events within the cryptocurrency market, the SEC staff recently issued disclosure guidance to public companies regarding the impact cryptocurrency market developments are having on business and financial results. The SEC Division of Corporation Finance urged reporting companies to re-visit disclosures with an emphasis on the influence of cryptocurrency market events on business or investors. The Corporation Finance staff posted a [sample comment letter](#) on December 8, 2022, illustrating the comments and questions issuers may receive regarding current and upcoming filings with the SEC.¹ More significantly, the sample letter provides insight on the disclosures that the staff expects to see for a company with any exposure to or association with the cryptocurrency market.

Although the sample letter and related guidance by the SEC staff do not constitute a rule, regulation, or official SEC statement, issuers should take note. This guidance comes weeks after FTX and other companies in the cryptocurrency market declared bankruptcy and during the persisting volatility in the market. The staff's guidance and sample letter encourage issuers to consider the impact of recent events in the cryptocurrency market on their description of business, management's discussion and analysis of financial condition and results of operations, and risk factors, among other things.

Sample comment letters preview actual comment letters issuers may receive from Corporation Finance and is another indication of the focus by the SEC's Chairman and the Commission on cryptocurrency concerns. We further believe that the SEC's Division of Enforcement ultimately will point to the staff's sample letter in investigations and allege disclosure failures for shortcomings in providing fulsome information regarding the outlined points.

Below is a summarized list of information the SEC may comment on, though not exhaustive:

Description of Business

- The direct, or indirect, material impact on the business, financial condition, customers, and counterparties as a result of the crypto-related bankruptcies, including whether an issuer has material assets that may not be recovered
- If material to understanding the business, direct or indirect exposure in the crypto asset markets related to the recent bankruptcies or redemptions and withdrawals
- If material to understanding the business, describe the policies and procedures in place to prevent self-dealing, conflicts of interest, and commingling of assets including customer assets, the business assets, and those of affiliates

Management's Discussion and Analysis of Financial Condition and Results of Operations

- Effect on financial condition and liquidity after excessive redemptions or withdrawals

- Whether the crypto assets owned, issued, or held on behalf of a third party serves as collateral and the associated financial arrangements of those agreements
- Whether any crypto assets issued serve as collateral for any other person's or entity's loan, to your knowledge

Risks Factors

- Market risk, direct or indirect, from redemptions or withdrawals of crypto assets, including quantifying any material exposure
- Any reputational harm caused by the recent disruptions and how customer perception has impacted the business
- Unauthorized customer access to products and services outside of the jurisdictions where the business has obtained governmental licenses and authorizations
- Legislative and regulatory risk including pending legislation
- Risks related to the safeguarding of customers' crypto assets and the risk to financial condition for ineffective policies and procedures surrounding the safeguarding of crypto assets
- Gaps in the company's processes to address crypto assets and the market disruption
- Financial and liquidity risk because of the change in value of the crypto assets the business or others use as collateral
- Risk due to the disruption in stock price, loss of customer demand, financing, losses, legal proceedings and government investigations, and price volatility

Haynes Boone lawyers look forward to advising clients on proactive disclosures to address this guidance and on responding to any comment letters or any other outreach from the SEC related to the volatility and disruption in the cryptocurrency markets.

¹ <https://www.sec.gov/corpfin/sample-letter-companies-regarding-crypto-asset-markets>

For more information, please contact one of the following Haynes Boone lawyers or a member of our [Capital Markets and Securities](#) group.